IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 19, 2007 Session

AARON BURKHART v. WELLS FARGO BANK WEST, N.A., ET AL.

Appeal from the Chancery Court for McMinn County
No. 22110 Jerri S. Bryant, Chancellor

Filed June 27, 2007

No. E2006-01402-COA-R3-CV

Aaron Burkhart ("Plaintiff") sued Wells Fargo Bank West, N.A. ("Wells Fargo"), Wilson & Associates, PLLC ("W&A"), and Robert M. Wilson, Jr. ("Wilson") alleging, among other things, misrepresentation and violation of the Tennessee Consumer Protection Act, § 47-18-101 *et seq.,* in connection with the purchase of real property by Plaintiff at a foreclosure sale. All defendants filed motions for summary judgment, which the Trial Court granted. Plaintiff appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

John W. Cleveland, Sweetwater, Tennessee for the Appellant, Aaron Burkhart.

William S. Lockett, Jr., Knoxville, Tennessee for the Appellee, Wells Fargo Bank West, N.A.

Jason S. Mangrum and Katherine Kellogg Kuhn, Nashville, Tennessee for the Appellees, Wilson & Associates, PLLC, and Robert M. Wilson, Jr.

OPINION

Background

Plaintiff purchased real property located at 160 County Road 326 in Sweetwater, Tennessee at a foreclosure sale in June of 2003. The property Plaintiff purchased at this sale, 160 County Road 326, was identified by the McMinn County property assessor as "Parcel 17" and "Parcel 22." Prior to the foreclosure, Parcel 17 and Parcel 22 were owned by Terry Thomas[1].

Thomas executed a Deed of Trust on Parcel 17 ("First Trust Deed") in 1993. The First Trust Deed, which was recorded, evidenced a debt owed to North American Mortgage Company with an original principal sum of $65,700. Wells Fargo later became the holder of the first Trust Deed by an unrecorded assignment.

In 2001, Thomas executed another Deed of Trust ("Second Trust Deed") with this Second Trust Deed being on both Parcel 17 and Parcel 22. The Second Trust Deed evidenced a debt owed to Wells Fargo with an original principal sum of $40,000.

In 2003, Wilson and W&A acting as trustee for Wells Fargo published notice of foreclosure as to the Second Trust Deed. The published notice stated that the foreclosure was subject to prior liens and encumbrances, but did not specifically mention the First Trust Deed. Plaintiff purchased Parcel 17 and Parcel 22 at the foreclosure sale of the Second Trust Deed in June of 2003. Plaintiff signed a waiver at the foreclosure sale that stated each property was sold "as is" with no representations or guarantees as to liens or encumbrances, among other things.

In December of 2003, Wilson and W&A acting as trustee for Wells Fargo published notice of foreclosure as to the First Trust Deed. Plaintiff purchased Parcel 17 at the foreclosure of the First Trust Deed for $62,066. Plaintiff then sued Wells Fargo, W&A, and Wilson alleging in his complaint, in part, that the defendants had a duty to disclose to Plaintiff the existence of the First Trust Deed when they conducted the foreclosure of the Second Trust Deed and that defendants failed to make such a disclosure. Plaintiff further claimed that defendants represented to Plaintiff during the foreclosure of the Second Trust Deed that the Second Trust Deed was the highest priority encumbrance such that if Plaintiff purchased the property at the foreclosure sale he would have title to Parcel 17 and Parcel 22 free and clear. Plaintiff further alleged in his complaint that he relied upon these representations in purchasing Parcel 17 and Parcel 22 at the foreclosure of the Second Trust Deed.

---

[1] The record on appeal reveals that some time prior to the foreclosure of the Second Trust Deed, Terry Thomas and his wife owned Parcel 17 and Parcel 22. However, by the time that notice was published of the foreclosure on the Second Trust Deed, Terry Thomas and his wife were divorced and Terry Thomas was the sole owner of Parcel 17 and Parcel 22. For purposes of simplicity, we refer to the former owner in this opinion as "Thomas" even though both Thomas and his wife executed the deeds of trust on Parcel 17 and Parcel 22 because Thomas' former wife had no interest and no obligations with regard to Parcel 17 and Parcel 22 by the time of the foreclosure action on the Second Trust Deed, and, therefore, had no rights whatsoever to Parcel 17 and Parcel 22.

Plaintiff testified in his deposition filed in the Trial Court that he is a dairy farmer who owns approximately 500 acres of land in McMinn County. Plaintiff began his current farm by purchasing 285 acres and over the years made several purchases adding to the acreage. Plaintiff's purchase of Parcel 17 and Parcel 22 at the foreclosure of the Second Trust Deed was the first time he ever had purchased real property at a foreclosure sale. Plaintiff was the only bidder at the sale.

Plaintiff knew of the foreclosure sale on the Second Trust Deed at least six weeks in advance of the sale. Initially, the foreclosure sale was listed in a Monroe County paper, but the sale had to be rescheduled because the land was not in Monroe County. The foreclosure sale was re-published in a McMinn County paper.

At the time Plaintiff learned of the first foreclosure sale, he had been leasing Parcel 17 and Parcel 22 for approximately two years from Thomas under a verbal agreement for use as pasture. Plaintiff testified that he attempted to help Thomas to keep from losing the land by agreeing with Thomas for Plaintiff to have a five year rental on the land for which Plaintiff paid $5,000 in advance. Under that agreement, Thomas used a Massey Ferguson tractor as collateral. Thomas, however, did not use the $5,000 to put off the foreclosure. Plaintiff knew that Thomas had not used the $5,000 as intended when the property was re-published in the newspaper for foreclosure sale.

Plaintiff attended the foreclosure sale on the Second Trust Deed and asked the woman handling the sale if the house was included. Plaintiff testified that this woman told Plaintiff that the sale was for the tract of land and any improvements that were on the tract would be sold with the tract. The woman handling the sale opened with a bid and Plaintiff countered with a bid of $50,700, and purchased the property.

Plaintiff admitted that he knew prior to attending the foreclosure sale on the Second Trust Deed that there were two deeds of trust on the property. He testified that he had gone to the courthouse and researched it.

Plaintiff further testified, contrary to the allegations contained in his complaint, that the woman who conducted the sale told Plaintiff that she was not allowed to comment on anything about the deeds of trust being released. Plaintiff thought the First Trust Deed was being released because the advertisement said the sale included Parcel 17 and Parcel 22. Plaintiff admitted that prior to the foreclosure sale, he never talked to anyone at Wells Fargo or W&A, other than the woman who conducted the sale.

All defendants filed motions for summary judgment, which the Trial Court granted. Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises one issue on appeal: whether the Trial Court erred in granting summary judgment.

In *Blair v. West Town Mall*, our Supreme Court reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. *Blair v. West Town Mall,* 130 S.W.3d 761 (Tenn. 2004). In *Blair*, the Court stated:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *See Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown,* 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South,* 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples*, 15 S.W.3d at 88.
>
> * * *
>
> When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.
>
> To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

Blair, 130 S.W.3d at 763, 767 (quoting *Staples*, 15 S.W. 3d at 88-89) (citations omitted)).

Our Supreme Court also has provided instruction regarding assessing the evidence when dealing with a motion for summary judgment stating:

> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer,* 952 S.W.2d at 426; *Byrd v. Hall,* 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder,* 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms,* 900 S.W.2d 23, 26 (Tenn. 1995).

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000).

Plaintiff's claims of misrepresentation and violation of the Tennessee Consumer Protection Act, § 47-18-101 *et seq.* rest upon his claim that defendants had a duty to disclose the existence of the First Trust Deed during the foreclosure of the Second Trust Deed and that defendants failed to make this disclosure. As this Court stated in *Justice v. Anderson County*:

> It is well-settled that fraud can be an intentional misrepresentation of a known, material fact or it can be the concealment or nondisclosure of a known fact when there is a duty to disclose. *Hill v. John Banks Buick, Inc.*, 875 S.W.2d 667 (Tenn. App. 1993); *Oak Ridge Precision Indus., Inc. v. First Tennessee Bank Nat'l Ass'n*, 835 S.W.2d 25 (Tenn. App. 1992); *Stacks v. Saunders*, 812 S.W.2d 587 (Tenn. App. 1990). Nondisclosure of a material fact may also give rise to a claim for fraudulent or negligent misrepresentation when the defendant has a duty to disclose and the matters not disclosed are material. *Dobbs v. Guenther*, 846 S.W.2d 270, 274 (Tenn. App. 1992).
>
> > Courts of this state have ruled that liability for non-disclosure can arise only in cases where the person sought to be held responsible had a duty to disclose the facts at issue. *In Domestic Sewing Machine Co. v. Jackson*, 83 Tenn. 418 (1885) our Supreme Court stated:
> >
> > In all cases, concealment or failure to disclose, becomes fraudulent only when it is the duty of a party having knowledge of the facts to discover them to the other party: 2 Pom. Eq., sec. 902. And this author, in the same section says: "All the instances in which the duty to disclose exists and in which a concealment is therefore fraudulent, may be reduced to three distinct classes:
> >
> > 1. Where there is a previous definite fiduciary relation between the parties.

2. Where it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other.

3. Where the contract or transaction is intrinsically fiduciary and calls for perfect good faith. The contract of insurance is an example of this class."

* * *

We will take our analysis one step further. The Tennessee Supreme Court had recognized a seller's duty to disclose material facts affecting the property's value known to the seller but not reasonably known to or discoverable by the buyer. *Simmons v. Evans*, 185 Tenn. 282, 285-86, 206 S.W.2d 295, 296 (1947).

Justice v. Anderson County, 955 S.W.2d 613, 616-17 (Tenn. Ct. App. 1997).

Plaintiff argues, in part, that defendants had a duty to disclose the existence of the First Trust Deed under common law. Under the common law, a seller has a "duty to disclose material facts affecting the property's value known to the seller but not reasonably known to or discoverable by the buyer." *Id*. at 617.

In the case now before us, defendants had no duty to disclose the existence of the First Trust Deed under this rule because the existence of the First Trust Deed was a matter of public record easily discoverable by a buyer. In fact, Plaintiff admitted during his deposition that he knew of the existence of the First Trust Deed prior to his purchase of the property at the foreclosure on the Second Trust Deed as he had gone to the courthouse and researched it.

Plaintiff also claims that defendants had a duty to disclose under Tenn. Code Ann. § 35-5-104. In pertinent part, Tenn. Code Ann. § 35-5-104 provides:

(a) The advertisement or notice shall:
(1) Give the names of the plaintiff and defendant, or parties interested;

* * *

(d) For the purposes of this section, "parties interested" includes, without limitation, the record holders of any mortgage, deed of trust, or other lien which will be extinguished or adversely affected by the sale and which mortgage, deed of trust, or lien, or notice or evidence thereof, was recorded more than ten (10) days prior to the first advertisement or notice in the register's office of the county in which the real property is located.

Tenn. Code Ann. § 35-5-104 (2001).

Under Tenn. Code Ann. § 35-5-104, a seller has a duty to disclose within the notice of sale the names of interested parties. As pertinent to the case now before us, 'interested parties' is defined in Tenn. Code Ann. § 35-5-104(d) to include "the record holders of any mortgage, deed of trust, or other lien which will be extinguished or adversely affected by the sale …." Tenn. Code Ann. § 35-5-104(d) (2001).

Because the First Trust Deed held priority over the Second Trust Deed, the First Trust Deed would not be extinguished or adversely affected by the foreclosure sale on the Second Trust Deed. Given this, defendants had no duty under Tenn. Code Ann. § 35-5-104 to disclose the existence of the First Trust Deed during the foreclosure of the Second Trust Deed.

Defendants had no duty under either the common law or under Tenn. Code Ann. § 35-5-104 to disclose to Plaintiff the existence of the First Trust Deed during the foreclosure of the Second Trust Deed. In addition, Plaintiff admits he knew of the existence of the First Trust Deed even without any such disclosure by defendants. Thus, defendants were able to negate an essential element of Plaintiff's claim.

We next consider Plaintiff's claim under the Tennessee Consumer Protection Act, § 47-18-101 *et seq*. This Court has stated:

> In order to recover under the TCPA, the plaintiff must prove: (1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant's conduct caused an "ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated.…" Tenn. Code Ann. § 47-18-109(a)(1).

Tucker v. Sierra Builders, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005) (footnote omitted). In *Tucker*, we explained that an act or practice "will not be considered unfair unless the injury is not reasonably avoidable by consumers themselves." *Id*. at 117.

The injury of which Plaintiff complains, i.e., having to purchase Parcel 17 a second time at the foreclosure of the First Trust Deed after first purchasing Parcel 17 at the foreclosure of the Second Trust Deed, was reasonably avoidable by Plaintiff. Plaintiff admitted that he knew of the existence of a prior lien when he attended the foreclosure of the Second Trust Deed. Plaintiff simply assumed, despite his having signed a waiver that stated that the property was sold "as is" with no representations or guarantees as to any liens or encumbrances having been made, that his purchase at this foreclosure would assure him clear and unencumbered title. Plaintiff could have reasonably avoided the alleged injury either by making further inquiries regarding the lien that he discovered when he researched the title prior to the foreclosure of the Second Trust Deed or simply by not purchasing the property at the first foreclosure sale in light of his knowledge of the existence of this other deed of trust. However, Plaintiff did not do so. As Plaintiff had the information and the means to avoid the alleged injury, defendants' failure to disclose cannot be considered an unfair practice under the Tennessee Consumer Protection Act, § 47-18-101 *et seq*. Given this, defendants have

negated an essential element of Plaintiff's claim under the Tennessee Consumer Protection Act, § 47-18-101 *et seq*.

There are no genuine issues of material fact and, even viewing the evidence in the light most favorable to Plaintiff and drawing all reasonable inferences in Plaintiff's favor, as we must, we find that defendants were entitled to summary judgment as a matter of law. We affirm the Trial Court's grant of summary judgment to all defendants.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Aaron Burkhart, and his surety.

_____

D. MICHAEL SWINEY, JUDGE